Supreme Court, U.S.
FILED
OCT 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THOMAS WHITE, et al.,

Petitioners,

v.

RICHARD ELROD and PHILLIP HARDIMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD M. DALEY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5475
Attorney for Respondents

IRIS E. SHOLDER *
DIANE KRISTEN
Assistant State's Attorneys
Of Counsel

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

I. Whether the lay Petitioner may represent the interests of persons other than himself in a *pro se* petition for writ of certiorari.

II. Whether Petitioner has failed to allege appropriate grounds to invoke the jurisdiction of the Court pursuant to 28 U.S.C. §1254(1), where the United States Court of Appeals determination that a prior and final determination by the Illinois State Courts barred Petitioner's civil rights suit involving identical parties and causes of action was consistent with 28 U.S.C. §1738.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I.	
ONLY THE PETITION OF PHILIP MORRIS IS PROPERLY BEFORE THE COURT	3
II.	
PETITIONER HAS FAILED TO ALLEGE APPROPRIATE GROUNDS TO INVOKE THE JURISDICTION OF THE COURT PURSUANT TO 28 U.S.C. §1254(1)	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	PAGE
Allen v. McCurry, 449 U.S. 90 (1980)	6
Fay v. Noia, 372 U.S. 391 (1963)	5
Kremer v. Chemical Construction Corporation, 456 U.S. 461 (1982)	6
Magnum Import Company v. Coty, 262 U.S. 159 (1923)	5
Move Organization v. U.S. Department of Justice, 555 F.Supp. 684 (E.D. Penn. 1983)	4
NLRB v. Pittsburgh S.S. Company, 340 U.S. 498 (1951)	5
Osborn v. United States Bank, 22 U.S. 738 (1824)	4
Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975)	4
Phillips v. Tobin, 548 F.2d 408 (2nd Cir. 1976)	4
Pilla v. American Bar Association, 542 F.2d 56 (8th Cir. 1976)	4
Spiller v. Continental Tube Company, 95 Ill.2d 423 (1983)	6
United States v. Johnson, 268 U.S. 220 (1925)	7
United States v. Peterson, 550 F.2d 379 (7th Cir. 1979)	4
Wayte v. United States, ____ U.S. ____, 105 S.Ct. 1524 (1985)	7

STATUTES AND RULES:

28 U.S.C. §1254(1) 5
28 U.S.C. §1654 4
28 U.S.C. §1738 6
42 U.S.C. §1983 ..... 2, 6
Supreme Court Rule 5 4
Supreme Court Rule 20.1 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THOMAS WHITE, et al.,

Petitioners,

v.

RICHARD ELROD and PHILLIP HARDIMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves the determination by the United States Court of Appeals for the Seventh Circuit that claims filed in the federal court alleging selective prosecution, race discrimination and free speech infringement, which were previously adjudicated in the state courts of Illinois (Pet. App. C-11, D-33), are barred by the principle of *res judicata.* (Pet. App. A-5) In 1980, 85% of the guards of the Cook County Department of Corrections in Chicago, Illinois, participated in an illegal strike. (Pet.

App. A-i) Due to that strike, 5000 inmates were inadequately guarded for 10 days. (Pet. App. A-2)

Because it was infeasible to discipline all 900 guards involved, Respondents suspended and filed charges with the Cook County Police and Corrections Merit Review Board against only 34 guards who were believed to have organized or exacerbated the illegal strike. (Pet. App. A-2 - 3) Charges were filed against Philip Morris and each of the other persons identified in the petition as "Parties Involved". (Pet. A-ii) Certain guards who were disciplined appealed the decision of the Merit Board to the Circuit Court of Appeals. (Pet. App. B-9cc) Meanwhile, the same guards also filed a civil rights suit under 42 U.S.C. §1983, involving the same facts at issue in the state court action. (Pet. App. B-9ee) Ultimately, the Illinois Appellate Court found that the disciplinary actions were just and lawful (Pet. App. C-11), and both the District Court and the United States Court of Appeals determined that the civil rights suit was barred by the principle of *res judicata.* Moreover, the District Court found no evidence of race discrimination. (Pet. App. B-90) The Court of Appeals upheld that finding as to two guards who had been reinstated with full back pay and whose claims therefore were not barred by *res judicata.* (Pet. App. A-8d) The petition seeks to invoke the discriminatory jurisdiction of the Court to review these determinations.

For the sake of brevity, Respondents adopt the more complete statement of the case and the presentation of the facts set forth in the opinion of the United States Court of Appeals for the Seventh Circuit. (Pet. App. A-1 - 4)

SUMMARY OF ARGUMENT

Philip Morris' *pro se* Petition for Writ of Certiorari must be deemed to advance only the interests of Philip Morris and not the interests of 21 other purported petitioners who have no right to representation by lay counsel. Philip Morris' attempt to represent the claims of persons other than himself constitutes unauthorized practice of law.

The petition of Philip Morris raises no substantial federal question. The decision of the United States Court of Appeals for the Seventh Circuit conforms with long-standing precedent regarding the full faith and credit accorded by federal courts to final determinations by the courts of the state. The purely factual issues raised in the petition are improper subjects for review under writ of certiorari.

ARGUMENT

I.

ONLY THE PETITION OF PHILIP MORRIS IS PROPERLY BEFORE THE COURT.

Petitioner Philip Morris, on behalf of himself and allegedly for 21 other lay persons named in the petition, seeks review of the decision of the United States Court of Appeals for the Seventh Circuit to accord full faith and credit to the final judgment of the Courts of the State of Illinois in a case involving parties and issues identical to those presented in federal court. For the reasons set forth below, the petition represents only the interests of Philip Morris and fails to present a substantial federal question warranting a writ of certiorari.

In all courts of the United States, parties may plead and conduct their own cases personally. 28 U.S.C. §1654. The right to self-representation however, does not include the right to be represented by lay counsel. *Osborn v. United States Bank*, 22 U.S. 738, 828 (1824) (the interests of a corporation must be represented by counsel in order to ensure the fair administration of justice); *Pilla v. American Bar Association*, 542 F.2d 56 (8th Cir. 1976) (litigants in civil and criminal cases do not have a right to be represented by lay counsel); *Phillips v. Tobin*, 548 F.2d 408 (2nd Cir. 1976) (stockholders must proceed with counsel in a derivative action against the corporation); *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975) (a prisoner cannot proceed *pro se* on behalf of a class of inmates because the competence of a layman is too limited to risk the rights of the class); *Move Organization v. United States Department of Justice*, 555 F.Supp. 684 (E.D. Penn. 1983) (in order to protect the fair administration of justice, an organization which filed a claim against federal and state correctional authorities could not proceed *pro se*.)

Petitioner Philip Morris has filed a *pro se* petition for writ of certiorari which purports to represent the interests of himself and 21 other lay individuals each of whom was the subject of a disciplinary prosecution based upon alleged participation in an illegal strike among correctional officers at the Cook County Department of Corrections in Illinois. Admission to practice before the Supreme Court requires, in part, proof of admission to the highest court of a state for at least three years. Supreme Court Rule 5. Philip Morris is not authorized to practice law in any jurisdiction. Unauthorized practice in a federal court in violation of the rules of the court, constitutes misbehavior tending to obstruct the administration of justice and is punishable by contempt. *United States v. Peterson*, 550 F.2d 379, 384 (7th Cir. 1979).

The individuals named in the petition, aside from Philip Morris, have no right to lay representation and therefore their claims should not be considered.[1] Only the petition on behalf of Philip Morris is properly before the Court.

II.

PETITIONER HAS FAILED TO ALLEGE APPROPRIATE GROUNDS TO INVOKE THE JURISDICTION OF THE COURT PURSUANT TO 28 U.S.C. §1254(1).

The petition raises no substantial federal question. As noted in Section I above, only Philip Morris has filed a proper timely *pro se* petition for writ of certiorari. However, even if the Court were to consider the claims not only of Philip Morris but also of the other lay persons purportedly advanced in the petition, each has failed to allege any basis sufficient to invoke the discretionary jurisdiction of the Court.

A writ of certiorari is not a matter of right. *Fay v. Noia*, 372 U.S. 391, 436 (1963). Discretionary jurisdiction to review cases from the circuit court was conferred upon the Supreme Court in order to secure uniformity of law between the circuits and to review important questions affecting the public interest. *Magnum Import Company v. Coty*, 262 U.S. 159 (1923). Certiorari is inappropriate in cases involving only the interests of the parties. *NLRB v. Pittsburgh S.S. Company*, 340 U.S. 498, 502 (1951).

Petitioner does not assert that the decision of the Seventh Circuit is in conflict with those of the other circuits or

---

[1] Each individual named in the petition, excluding Philip Morris has failed to petition for writ of certiorari within 60 days of the entry of the judgment of the United States Court of Appeals and therefore each is time barred from petitioning for certiorari review. (Supreme Court Rule 20.1)

that the decision affects principles important to the public interest. Indeed, neither basis for the exercise of the Court's discretionary jurisdiction exists in the instant matter.

The Seventh Circuit followed well-established precedent in determining that the Illinois doctrine of *res judicata* applied to petitioner's federal suit and that under that doctrine petitioner's claim pursuant to 42 U.S.C. §1983 was barred. Federal courts must give full faith and credit to the decisions of the states' courts. 28 U.S.C. §1738. Actions pursuant to 42 U.S.C. §1983 are subject to the preclusion rules which may bar federal courts from freshly deciding constitutional issues previously litigated in state courts. *Allen v. McCurry*, 449 U.S. 90, 98 (1980). Moreover, federal courts must give the same preclusive effect to a state court judgment that the judgment would be given in the courts of the state from which the judgment emerged. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, *rehearing denied*, 458 U.S. 1133 (1982).

Under Illinois law, the doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Spiller v. Continental Tube Company*, 95 Ill.2d 423 (1983). As noted in the opinions of the District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit (Pet. App. B-9ee and Pet. App. A-86), Petitioner's state and federal suits involved the identical parties and causes of action, arising out of the same core of operative facts. Consequently, the Illinois doctrine of *res judicata* barred Petitioner's federal suit. *Id.*

The Seventh Circuit also determined that the Illinois doctrine of *res judicata* did not bar the civil rights claims of two officers who had prevailed before the Merit Board and were reinstated with full back pay because their victory at the Merit Board level precluded review and final adjudication of their claims in the state courts. (Pet. App. A-6) The federal claims of those two officers, however, were found to be without merit. (Pet. App. A-4) As noted in Section I above, only the petition of Philip Morris is properly before the Court. However, even if the Court were to consider a petition for writ of certiorari on behalf of the two reinstated officers, the petition would fail.

The Seventh Circuit determined that the two officers who maintained federal claims which were not precluded, were not the subjects of unlawful selective prosecution. As the Court of Appeals noted, the prosecutor has the right to decide which charges to prosecute so long as the decision is not based upon unjustifiable standards. *Wayte v. United States*, ____ U.S. ____, 105 S.Ct. 1524, 1531 (1985). The Court of Appeals reviewed the record and concluded that the standards for selective prosecution were justifiable. (Pet. App. A-8f - 8h) That determination is not the proper subject of discretionary review. Certiorari is never granted to review evidence or consider issues of fact. *United States v. Johnson*, 268 U.S. 220 (1925). The additional charges of racial discrimination regarding the nature and extent of the discipline imposed raised in the petition of Philip Morris are, of course, moot as to the two officers who were reinstated with full back pay.

The petition advances only the claims of Philip Morris and fails to present any substantial federal question for review. The petition seeks also to disturb purely factual determinations and therefore fails to allege grounds sufficient to invoke the discretionary jurisdiction of the Court.

CONCLUSION

WHEREFORE, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD M. DALEY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5475
Attorney for Respondents

IRIS E. SHOLDER *
DIANE KRISTEN
Assistant State's Attorneys
Of Counsel

* Counsel of Record